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Labor Law - The Illinois Anti-Injunction Act Is Not Applicable to Strikes by Public Sector Employees and Such Strikes are Illegal Per Se - City of Pana v. Crowe

Max G. Brittain Jr.

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LABOR LAW—The Illinois Anti-Injunction Act Is Not Applicable to Strikes by Public Sector Employees and Such Strikes Are Illegal Per Se
—City of Pana v. Crowe

We have repeatedly held that the doctrine of stare decisis is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present day concepts of right and justice.

With that pronouncement, the Illinois Supreme Court abolished the doctrine of sovereign immunity from tort liability in Illinois. It is now time for the court to address itself to the issue of another sovereignty question: the right of public employees in general, and school teachers in particular, to strike. The court had an opportunity in its recent decision of City of Pana v. Crowe to deal forthrightly with the question of strikes in the public sector. This article will review the Pana decision and its effect on the legality of public employee strikes and will additionally examine the application of the Illinois Anti-Injunction Law to such strikes.

CITY OF PANA V. CROWE

The case arose as a result of a strike by employees of the City of Pana’s water, sewer, street and police departments. The city obtained a temporary injunction ex parte and, following a hearing, a permanent injunction. Defendants appealed to the Illinois Appellate Court,
Fifth District, contending that the injunction was issued in violation of the express terms of the anti-injunction act.\(^5\)

In reversing the lower court, the appellate court noted that in *Board of Education of Community Unit School District No. 2 v. Redding*,\(^6\) the Illinois Supreme Court had declared that public policy transcends the right of school employees to strike, but had made no mention of the anti-injunction statute.\(^7\) Finding *Redding* inapplicable, the court turned to two decisions which had dealt squarely with the anti-injunction act, *Peters v. South Chicago Community Hospital*\(^8\) and *County of Peoria v. Benedict*.\(^9\) In the *Peters* case, the Illinois Supreme Court refused to apply the public policy exemption of *Redding* and held the anti-injunction act applicable to not-for-profit hospitals. In the subsequent *Benedict* decision, the court applied the *Peters* reasoning to a strike by public employees of a nursing home. Persuaded by this *Peters-Benedict* rationale, the appellate court in *Pana* deemed itself compelled to hold the anti-injunction act applicable to the case at hand.\(^10\)

The court went on to note that the anti-injunction act is the only legislative expression of public policy with regard to the labor relations of these municipal employees. It concluded by expressing dissatisfaction with the legislature for not enacting comprehensive legislation appropriate to public employees. This inaction, the court observed, has forced the judiciary to establish a segmented and piecemeal approach to labor relations in the public sector.\(^11\)

On appeal, the supreme court reversed. Justice Schaefer, speaking for a unanimous court, stated that:

> In our opinion neither the *Peters* case nor the *Benedict* case requires

\[(a) \text{ Engaging in a strike or any form of cessation of work against the City of Pana;}\]
\[(b) \text{ Hindering or obstructing in any manner the use and maintenance of the building, structures, machinery, and equipment owned, rented, maintained and used by the City of Pana, in its governmental or proprietary functions.}\]

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7. 32 Ill. 2d 567, 207 N.E.2d 427 (1965) (a strike by school custodial workers).
11. *Id.* at 94, 299 N.E.2d at 773.
that we depart in this case from the long-standing rule that public employees have no right to strike and that a strike by them is unlawful and therefore not within the scope of the anti-injunction act. The court's conclusion is based on the following propositions: (i) all strikes by public employees are per se unlawful and (ii) the anti-injunction act does not apply to unlawful work stoppages by public employees. The rationale behind these propositions will be examined in detail in the course of this article.

STRIKES PER SE ILLEGAL

In stating its position that public employee strikes are illegal, the Pana court reiterated the holding of the leading Illinois case in this area, Board of Education v. Redding. Justice Daily, speaking for the court in Redding, made the following observation:

Although this is a case of first impression in a reviewing court of this jurisdiction, it is, so far as we can ascertain, the universal view that there is no inherent right in municipal employees to strike against their governmental employer, whether Federal, State, or a political subdivision thereof, and that a strike of municipal employees for any purpose is illegal. The underlying basis for the policy against strikes by public employees is the sound and demanding notion that governmental functions may not be impeded or obstructed, as well as the concept that the profit motive, inherent in the principle of free enterprise, is absent in the governmental function.

The Redding case involved a strike by thirteen custodial workers against the school board in an attempt to gain bargaining recognition. The trial court refused to grant an injunction. On appeal, the supreme court reversed on the ground that municipal employees have no inherent right to strike. The rationale and holding of Redding has been used by Illinois courts to invalidate strikes by firemen, policemen and schoolteachers. This reliance on Redding patently ignores the substantial changes in public sector labor relations since 1965. As will be discussed more fully below, much of the foundation of the Redding decision has been eroded since its pronouncement. It is no longer the "universal

13. 32 Ill. 2d 567, 571-72, 207 N.E.2d 427, 430 (1965).
view" that strikes by all public employees are illegal. This is particularly true of school employees, the group directly involved in Redding.

**Legislative Activity**

There have been numerous attempts in Illinois to enact legislation which would provide a basic framework for public sector labor relations.\(^{15}\) Two separate investigative commissions have recommended the adoption of appropriate legislation, but none has been forthcoming.\(^{16}\) This reprehensible lack of legislative action has left the judiciary without any absolute basis for modifying their present Redding-based philosophy.\(^{17}\) However, there are ascertainable trends which should not be ignored.

Following the 1967 Kerner Report, legislative efforts based on its recommendations were unsuccessful. The failure was apparently caused by the no-strike provision of the proposed law.\(^{18}\) The 1971 Ogilvie Report altered the Kerner Report's recommendations by concluding that:

> [A] limited right to strike [should] be allowed public employees whose continued service at the time is not held vital to public health, safety, or welfare, provided that impasse procedures have run their course.\(^{19}\)

Bills reflecting this changing attitude have been introduced,\(^{20}\) and one particular bill pertaining solely to school employees, H.B. 1652, passed the House in 1973 but failed by four votes to secure removal from the Senate Labor Laws Committee. The bill provided for a limited right to strike, and specifically declared the anti-injunction law applicable to such strikes.\(^{21}\)

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21. H.B. 1652, 78th General Assembly of Illinois (1973). The pertinent section provides as follows:
The supreme court’s answer to this legislative impasse was simply:

The General Assembly has acquiesced in the conclusion of this court and the appellate court with respect to the unlawfulness of strikes of public employees.\textsuperscript{22}

While this may be technically correct, it belies the realities of the legislature’s present tenor. It is, in fact, stalemated by the no-strike issue.\textsuperscript{23}

In an effort to provide some relief for the public employee situation, Governor Walker issued an Executive Order in 1973 establishing collective bargaining procedures for employees working for agencies and departments subject to the Governor.\textsuperscript{24} Conspicuously absent from this order was any mention of strikes.\textsuperscript{25}

While the Illinois Legislature has failed to provide the direly needed framework, other states have not been so dilatory. At the time of the Pana decision, six state legislatures had provided school employees with a limited right to strike.\textsuperscript{26} In addition, “teacher only” bargaining stat-

Sec. 13. Strikes. (A) Public school employees included within an appropriate unit for which an exclusive bargaining representative has been certified or which is represented by an exclusive bargaining representative under Section 6(E) shall not engage in a strike except under the following conditions:

1. the procedures set forth under Sections 12(A) and (B) have been completely utilized and exhausted with respect to such unit;
2. at least 3 days have elapsed after a notice of intent to strike has been given by the exclusive bargaining representative to the public school employer and to the Board;
3. the collective bargaining agreement between the parties, if any, has expired.

Notwithstanding the foregoing, if in the opinion of a public school employer a strike is or has become a clear and present danger or threat to the health or safety of the public, it may initiate in the circuit court of the county in which such danger or threat exists an action for equitable relief including, but not limited to, injunction. The court may grant appropriate relief upon the finding that such clear and present danger or threat exists. An unfair practice by a public school employer shall not be a defense to an illegal strike. The jurisdiction of the court under this Section is limited by “An Act relating to disputes concerning terms and conditions of employment,” approved June 19, 1925.

23. See Kiley, supra note 17, at 311-12.
24. EXECUTIVE ORDER No. 6 (Sept. 4, 1973). See also Goldstein, supra note 15, at 385-90. Excluded from coverage by the Order are employees of local agencies such as teachers, firemen and policemen. Coverage is extended only to employees who are paid by voucher subject to the approval of the Department of Finance.
26. ALASKA STAT. § 23.40.200 (1972) (grants right to strike for certain public employees, including school teachers, until it can be shown that it threatens the health, safety, or welfare of the public; HAWAII REV. STAT., tit. 7, § 89-12 (Supp. 1973) (strikes authorized if not endangering public health or safety); MINN. STAT. ANN. §§ 179.64-7 (Supp. 1973) (strikes allowed where employer refuses to abide by arbitrator’s award, or refuses to request binding arbitration); ORE. REV. STAT. §§ 243.726 (1973) (strike allowed if procedures followed and no threat to health, safety or welfare of the public); PA. STAT. ANN. tit. 43, §§ 1101.1001-1003 (Supp. 1974) (strike authorized if impasse procedures exhausted and no clear and present danger or threat to the health, safety or welfare of the public); VT. STAT. ANN. tit. 16 § 2010 (Supp. 1974) (injunctions denied

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tutes are currently in effect in seventeen states\textsuperscript{27} and at least twelve other states include teachers in their public employee bargaining statutes.\textsuperscript{28} This is not meant to suggest that the no-strike issue is undergoing complete metamorphosis, as the vast majority of states still prohibit strikes of any kind by public employees.\textsuperscript{29} However, a judiciary forced into making public policy decisions should be cognizant of what changes are occurring and react to trends which may be developing. The supreme court not only failed to re-evaluate their position in \textit{Pana}, but failed to even acknowledge that any change has taken place.

\textit{Common Law Activity}

As was previously noted, the \textit{Pana} court relied on the prior \textit{Redding} decision in denying all public employees the right to strike under any condition.\textsuperscript{30} Since 1965, however, there has been a substantial amount of case law recognizing and defining the rights of public employees, particularly teachers. Here in Illinois, courts have found that school boards and teacher associations may enter into collective bargaining agreements.\textsuperscript{31} They have acknowledged the right of free association by teachers.\textsuperscript{32} They have decided what matters may, in the board's discretion, be delegated\textsuperscript{33} and they have defined who has standing to sue to enjoin a teachers' strike.\textsuperscript{34} The courts have gone so far as to require negotiation in open court.\textsuperscript{35}

This activity has been supplemented by the United States Supreme Court's proscription of certain state denials of protected rights. Most of the cases have dealt with freedom of speech and association. The Court warned of "unwarranted inhibition upon the

\begin{itemize}
\item unless strike poses a clear and present danger to a sound program of school education which is in the best public interest to prevent).\textsuperscript{27}
\item Alaska, California, Connecticut, Delaware, Florida, Idaho, Indiana, Maryland, Montana, Nebraska, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont and Washington.\textsuperscript{28}
\item Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Pennsylvania, South Dakota and Wisconsin.\textsuperscript{29}
\item See J. Peterson, \textit{STATE EDUCATION AGENCY ROLES IN TEACHER COLLECTIVE NEGOTIATIONS} 5-8 (Report of Illinois Office of the Superintendent of Public Instruction) (1974); 37 A.L.R.3d 1147 (1971).\textsuperscript{30}
\item See text accompanying note 13, \textit{supra}.\textsuperscript{31}
\item Chicago Div. Ill. Ed. Ass'n v. Board of Education, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).\textsuperscript{32}
\item Chicago High School Assistant Principals Ass'n v. Bd. of Ed. of Chicago, 5 Ill. App. 3d 672, 284 N.E.2d 14 (1972); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).\textsuperscript{33}
\item Board of Education v. Rockford Education Association, 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972).\textsuperscript{34}
\item Allen v. Maurer, 6 Ill. App. 3d 633, 286 N.E.2d 135 (1972).\textsuperscript{35}
\item Kiley, \textit{supra} note 17, at 315 n.22.
\end{itemize}
free spirit of teachers” in Shelton v. Tucker and, in Garrity v. State of New Jersey, Justice Douglas stated:

We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.

There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.

The Court went even further in repudiating the distinction in constitutional status of public and private employees in Keyishian v. Board of Regents of University of State of New York, where the Court held:

[C]onstitutional doctrine . . . has rejected [the premise] that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.

. . . [T]he Court of Appeals for the Second Circuit correctly said in an earlier stage of this case, “. . . the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.” Keyishian v. Board of Regents, 345 F.2d 236, 239.

With these cases providing the foundation, defenders of striking public employees have argued that an absolute prohibition of strikes raises constitutional questions of (i) involuntary servitude and (ii) the due process and equal protection standards of the fourteenth amendment. Judicial reaction to these arguments have been generally unfavorable.

The involuntary servitude argument is usually made when a court has enjoined a strike and ordered the striking employees back to work. In response, courts have answered that the employees can quit, and thus avoid working against their will.

The due process-equal protection argument is more fervently and frequently offered, but has met with limited acceptance. A variant of this argument was presented in the Pana case by the Illinois Education Association as amicus curiae. The reasoning is syllogistic:

38. 385 U.S. 589, 605-06 (1967).
40. See, e.g., Pinellas County Classroom Teachers Ass’n v. Bd. of Public Instruction, 214 So. 2d 34, 37 (Fla. 1968); In re Block, 50 N.J. 494, 499, 236 A.2d 589, 592 (1967).
1. Private employees and public employees both have a right, constitutionally, to bargain collectively.\footnote{42}  
2. Bargaining collectively encompasses a right to strike of constitutional stature, limited only where its purpose is destructive or effect harmful to the public health or safety.\footnote{43}  
3. Therefore, public employees have conditional strike rights, prohibited only when irreparable injury or harm would occur.\footnote{44}  

The *Pana* court failed to deal with the issues presented by this argument. Those courts which have considered the argument have generally denied it by listing the various differences between public and private employees and concluding that, *a fortiori*, a legitimate distinction is constitutionally permissible.\footnote{45} This provides a second line of attack against the proposition that public employee strikes are per se illegal, for if the reasons for differentiation are without merit, it logically follows that the denial of equal protection is improper. It is at this level that public policy considerations arise and, quite expectedly, that disagreement as to the solution reaches its peak.

**Distinguishing Factors**

There are generally three alternative reasons given for distinguishing public and private strikes:


\footnote{43}{Brief for Illinois Education Association as Amicus Curiae at 6, *City of Pana v. Crowe*, 57 Ill. 2d 547, 316 N.E.2d 513 (1974). This premise construes N.L.R.B. v. Jones 
& Laughlin Steel Corp., 301 U.S. 1 (1937), as recognizing the right to strike as being encompassed within the right to bargain, and prohibited only if destructive or harmful to the public health. This is further supported by Dorchy v. Kansas, 272 U.S. 306, 311 (1926), where Justice Brandeis accepted that “[n]either the common law, nor the Fourteenth Amendment, confers the absolute right to strike,” but it is contended that he established that right to be constitutionally protected and thus any attempt to limit it should be carefully scrutinized. The last supportive case cited is Stapleton v. Mitchell, 60 F. Supp. 51, 61 (D. Kan. 1945), where the court stated: The right to peacefully strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community. These authorities provide the basis for the conclusion that strikes not posing a serious threat to the public health and safety are within the province of constitutional protection, and that based on Keyishian v. Board of Regents, 385 U.S. 589 (1967), Shelton v. Tucker, 364 U.S. 479 (1960), N.A.A.C.P. v. State of Alabama, 357 U.S. 449 (1958), and N.A.A.C.P. v. Button, 371 U.S. 415 (1963), an attempt to prohibit public school employees from doing what their private school counterparts are allowed can be upheld only on the most compelling showing of necessity.}

\footnote{44}{Brief for Illinois Education Association as Amicus Curiae at 9, *City of Pana v. Crowe*, 57 Ill. 2d 547, 316 N.E.2d 513 (1974).}

ing public employee strikes from those by private sector employees. The first involves the doctrine of governmental sovereignty. While the specific argument may vary, the overall theme is that a strike against the government is tantamount to denial of its authority and a form of insurrection.\textsuperscript{46} The second involves the type of services rendered. It presupposes that governmental functions are essential and that a strike disrupting this service contravenes the public welfare and results in a paralysis of society.\textsuperscript{47} The third reason is basically political. It is maintained that by allowing public employees to strike, the political process will become distorted.\textsuperscript{48}

\textbf{Sovereignty}

The notion that strikes against the government are in defiance of its authority as the sovereign is becoming largely anachronistic.\textsuperscript{49} In its original form, the argument was predicated on the belief that governmental employees were essentially agents of the government and, as such, were exercising a portion of the sovereign power. Thus, a strike by them would be a strike against government itself and in essence a rebellion or insurrection.\textsuperscript{50} The fault with this premise is its failure to distinguish between the various functions performed by government, specifically government as authority versus government as employer. If the argument is to maintain validity, it must logically follow that the governmental function as authority is somehow impinged, since a strike against an employer is not, in and of itself, an activity of insurrectional dimension. This possibility is negated by

\textsuperscript{46} E.g., Norwalk Teachers Ass'n v. Board of Education, 138 Conn. 269, 276, 83 A.2d 482, 485 (1951), in which the court said: "In the American system, sovereignty is inherent in the people. They can delegate it to a government . . . [which] must employ people to carry on its task . . . . They occupy a status entirely different from those who carry on a private enterprise. . . . To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare . . . ." Also, in City of Pawtucket v. Pawtucket Teachers' Alliance, 87 R.I. 364, 371, 141 A.2d 624, 628 (1958), the court said: The teachers who were involved in the strike in the instant case are, therefore, agents of the state government and as such exercise a portion of the sovereign power . . . .


\textsuperscript{49} D. Wollett & R. Chanin, supra note 39, at 6:114.

\textsuperscript{50} See City of Pawtucket v. Pawtucket Teachers' Alliance, 87 R.I. 364, 141 A.2d 624 (1958).
the realization that most governmental agencies, especially school boards, are given a wide range of discretion in executing their duties. Until express statutory duties are violated, agreements between school boards and teacher associations fall within this range of discretion. Therefore, as long as the agency or school board is not forced into abrogating its statutory obligations, its authority has not been denied and a rebellion or insurrection has not taken place. 51

The Illinois Supreme Court did not specifically use this sovereignty argument in Redding or Pana as a basis for finding public sector strikes illegal. However, much of the foundation for the conclusion in Redding that strikes impede and obstruct governmental functions is based on authority from other states which had used this rationale. 52

In fact, the Redding court quoted extensively from City of Pawtucket v. Pawtucket Teachers' Alliance 53 as providing persuasive reasoning for its decision. 54 Pawtucket involved a 1958 strike by teachers in Providence County, Rhode Island. The Supreme Court of Rhode Island affirmed the lower court's grant of a preliminary injunction. In so doing, the court based its holding on the fact that teachers are an integral part of local government, that as such they are governmental agents exercising a portion of the sovereign power with no legal right to strike against the city, and that such a strike is illegal and subject to an injunction.

In addition, in subsequent cases the Illinois Supreme Court has indicated that a distinguishing aspect of the Redding case was that it involved school employees. 55 As such, their strike activity is curtailed by the public policy pronouncement of the 1870 Constitution which stated that the General Assembly has the duty to "provide a thorough and efficient system of free schools." 56 The court's conclu-

51. Adding further to the demise of the sovereignty rationale has been the recent rejection by most courts of the doctrine of governmental immunity from tort liability. See W. Prosser, Law of Torts 984-87 (4th ed. 1971).
56. Ill. Const. art. VIII, § 1 (1870). It should also be noted that aside from the
ession with regard to this pronouncement was that school employees were the agents to fulfill this duty, and as such, they must refrain from any conduct which would render the schools less efficient and thorough. The severe attacks on this reasoning underscore the need for the supreme court to fully review its position.

Furthermore, the Pawtucket case itself, primarily relied upon by the Redding court, has seen its effect modified by a more recent Rhode Island decision, School Committee of Westerly v. Westerly Teachers Association.

Essentiality

It is contended by those who adhere to this line of argument that governmental services are by and large essential. These services differ from those of the private sector by their very nature and are usually incapable of being replaced by alternative suppliers. Moreover, the loss of these services often results in immediate and irreparable harm to the safety and welfare of the public. Finally, assuming that differentiation could be made between some essential and non-essential services, it would be difficult to do so. Therefore, it is contended the best solution is to ban all strikes by public employees. This is the current philosophy of the Illinois Supreme Court, as pronounced in Redding and reiterated in Pana:

Ordinarily the functions provided by government are not of such a nature that substitution of product or of service is possible, as it often is in the case of strikes in the private sector. Moreover,
strikes of public employees are very apt to create immediate emergencies bearing sharply upon the health, safety and welfare of the public.\textsuperscript{59} This is also the position taken by many advocates of no-strike provisions in collective bargaining legislation.\textsuperscript{60}

The problem with this reasoning is that it defies two basic guidelines of our judicial system: logic and experience. It should be remembered that this rationale is being offered to distinguish public employees from private sector employees in order to withstand attacks based upon denial of equal protection under the fourteenth amendment. To be consistent with this distinction, there must be some compelling necessity about their services which does not exist in the private sector. Few would dispute that certain employees may well fit this category, \textit{i.e.}, firemen, policemen, and prison guards; but can it seriously be argued that strikes by public zoo keepers, librarians, or golf course employees are more paralyzing to society than strikes by private utility workers or private hospital employees? Indeed, there is no difference in the impact on community welfare between striking public school bus drivers and private school bus drivers, or between private utility workers and their public counterparts.\textsuperscript{61}

The situation is the same with school teachers. An oft-quoted phrase puts this in proper perspective:

Schools are closed for summer, Christmas, Easter, and Thanksgiving vacations, for football games, basketball tournaments, harvesting, teachers’ conventions, inclement weather, presidential visits, and for a host of other reasons without anyone getting excited over the harm done to children. But if schools are closed for one day as a result of a teacher strike, the time lost supposedly constitutes irreparable damage to them. Intellectually, this is not an overwhelming argument.\textsuperscript{62}

There has been a wealth of criticism attacking the logic of this es-

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\item \textsuperscript{59} City of Pana v. Crowe, 57 Ill. 2d 547, 553, 316 N.E.2d 513, 516 (1974).
\item \textsuperscript{60} See Shaw and Clark, supra note 17, at 645.
\item \textsuperscript{61} See Guinan, \textit{The Unreal Distinction Between Public and Private Sectors}, 96 Monthly Lab. Rev. 46 (1973) [hereinafter cited as Guinan]. In speaking on this distinction Guinan says:
\begin{quote}
Here in San Francisco, the city maintains a zoo to care for a lot of interesting animals. Its employees are in the public sector. The city has also some distinguished private hospitals. Their employees are in the private sector. If we are to develop more potent alternatives to the strike in areas where a strike would threaten the greater harm to the public welfare, should we be more concerned over a strike in a zoo than in a hospital?
\end{quote}
In Philadelphia, the retail liquor stores are state-owned and operated. The gas and electric utilities are private corporations. I know I am risking some facetious replies, but I ask you, would Philadelphians be better off without electricity and gas or without Scotch and gin?
\item \textsuperscript{62} M. Lieberman & M. Moskow, \textit{Collective Negotiations for Teachers} 299 (1966).
\end{itemize}
\end{footnotesize}
sentential, non-essential dichotomy. It has come not only from labor experts, but the judiciary as well. At present, the highest courts of Michigan, Rhode Island, and New Hampshire have refused to issue injunctions in teacher-strike situations without a showing of irreparable harm to the community.

In addition, there have recently been several major field research studies whose conclusions lend support to those attacking the essentiality argument. The first was done during the Philadelphia teacher strikes of 1972 and 1973, and found no significant difference in pupil achievement between those who were out of school during the eight weeks of the strike and those who had not missed class. The second, done here in Illinois, analyzed impasse resolution strategies and made an in-depth study of seven 1972 Illinois teacher strikes. The conclusions not only emphasize the necessity of the strike strategy as facilitating meaningful, good faith bargaining and terminating impasses, but also that:

[T]he strike did not create imminent peril or risk to the health and safety of the community in any of the seven school districts investigated.

This is not to suggest that a teachers’ strike could never pose a threat to the safety and welfare of the community. Those legislatures and courts who have refused to proscribe all such strikes have nevertheless retained the authority to enjoin public sector strikes when an imminent danger to the community is presented. This is preferable

67. Lyle & Janoff. The Effects (if Any) of a Teacher Strike on Student Achievement, 55 PHI DELTA KAPPAN 270 (1973); see also Alderfer, Follow-up on the Pennsylvania School Strikers, 25 LAB. L.J. 161 (1974). Alderfer points out that impressions of the Pennsylvania law allowing limited strike privileges were favorable and it is generally accepted as good law. He also states that most observers view the effects of the strikes that have occurred since its enactment as minimal.
69. Id. at 212.
70. See Philadelphia Federation of Teachers v. Ross, 8 Pa. Cmwlth. 204, 301 A.2d 405 (1973). An injunction was granted following a showing of a clear and present danger to the health, safety and welfare of the public. The proof consisted of such things as increased gang activity and $133,000 per day expense for additional police protection.
to an outright ban on all public employee strikes under the somewhat questionable rationale that they are apt to create "immediate emergencies bearing sharply upon the health, safety and welfare of the public."  

Distortion of Political Process

The third major argument against public sector strikes looks not only to the immediate effects of such activity, but to the possible long range effects such strikes might have on the political process. This analysis views public sector strikes as basically political in nature; the loss of essential services causes pressures from the constituency for early settlement which forces governmental employers to adopt measures which are politically expedient rather than economically sound. This would then allow the stronger public unions a disproportionate share of the available public funds. The argument is a valid one and the more essential the service, the more dangerous is the possibility of political expediency. It is not at all difficult to envision state funds being diverted from welfare funding to pay salary increases for striking policemen or firemen. Professors Wellington and Winter, the major proponents of this argument, indicate this has already happened in one instance in which state urban aid funds were diverted to salary increases for police and firemen in New Jersey.

However, the argument advanced is not an end in itself—it is an admonition. The solution would seem to lie not in outright bans of public sector strikes, but in legislation providing alternatives to impasse resolution.

See note 26, supra, for examples of statutory limits which are imposed on public employees. Most states allow injunctions when threats to health, safety, or welfare of the public are shown.

72. See Wellington & Winter, supra note 48, at 1124.
73. Id. at 1124 n.59.
74. Many authorities have urged adoption of alternative impasse resolution rather than strikes. See Anderson, Strikes and Impasse Resolution in Public Employment, 67 Mich. L. Rev. 943 (1969). He states that only in a police state can absolute guarantees against strikes be possible. He favors political collective bargaining with voluntary or binding arbitration. See Bernstein, Alternatives to the Strike in Public Labor Relations, 85 Harv. L. Rev. 459 (1971). He suggests that blanket bans do not work and proposes a nonstoppage strike where both employees and employer pay money to a special fund and a graduated strike where workers would stop, with a corresponding wage loss during a portion of their usual workweek. See Bilik, Toward Public Sector Equality: Extending the Strike Privilege, 21 Lab. L.J. 338 (1970). Bilik's argument is an interesting one in that he believes that the giving of unconditional strike rights would serve as a deterrent to strikes. He asserts that with such a right an incumbent higher degree of responsibility is created. Presently, with strikes illegal, public employees do not have the one fear their private counterparts experience: the possibility of an extended strike with accompanying economic hardship. When public employees go on strike, they count on
ANTI-INJUNCTION LAW: APPLICATION

The application of the anti-injunction law\(^75\) to public employee strikes was the major issue of the *Pana* case. Whether strikes by such employees are per se illegal, or unlawful only when endangering the public welfare and safety, the mode of dealing with them is the injunction.\(^76\) However, as will be subsequently discussed, there are jurisdictions which limit the injunctive relief available despite legislative prohibitions against striking public employees.

The Illinois Supreme Court has approached this issue from a public policy perspective. The first relevant case was, of course, the *Redding* decision. Although the anti-injunction law was not at issue, the court granted the injunctive relief sought primarily because of its holding that strikes against a government employer are unlawful. However, the court went on in justification of its position by articulating the public policy concerns it felt were mandated by the constitutional provision providing for proper and efficient education of the children.\(^77\) Although apparently dicta, these policy concerns were echoed in two subsequent cases dealing squarely with the anti-injunction law.

The first, *Peters v. South Chicago Community Hospital*,\(^78\) involved a strike by private employees of a not-for-profit hospital. Noting that such employees were expressly excluded from coverage by the National Labor Relations Act,\(^79\) the court reversed the appellate court's decision

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\(^{75}\) ILL. REV. STAT. ch. 48, § 2a (1973):
No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising, or persuading others so to do; or from peaceably and without threat or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do.


\(^{77}\) Board of Educ. of Community Unit Dist. No. 2 v. Redding, 32 Ill. 2d 567, 575, 207 N.E.2d 427, 432 (1965).

\(^{78}\) 44 Ill. 2d 22, 253 N.E.2d 375 (1969).

\(^{79}\) 29 U.S.C. § 152(2) (1973). Subsequent legislation has placed these employees of nonprofit hospitals under the protection of the N.L.R.A.
that the operation of the hospital involved a public interest of such urgency that labor's right to strike must yield. In so doing, it stated:

The language of the statute is clear and it makes no exceptions for hospitals . . . . Unlike Redding there is no overriding expression of public policy here such as the constitutional mandate that the General Assembly shall "provide a thorough and efficient system of free schools . . . ." 80

The second case raising the issue of the applicability of the anti-injunction law, City of Peoria v. Benedict, involved striking municipal employees of a nursing home. The court succinctly stated:

In Peters . . . we held the Illinois anti-injunction law applicable to employees of a non-profit hospital. For the same reasons stated therein, we find the anti-injunction act applicable to the instant case. 81

The result, as noted by members of the Ogilvie Commission, was a state of confusion. 82 The feeling of observers and commentators was that in Illinois, the rather anomalous result was that an injunction could be issued against striking school employees, but not against other public employee groups unless comparable constitutional or legislative policy could be found. 83

This was further confirmed by the appellate court in Pana, which failed to find any substantial distinction in public service between the nursing home employees in Benedict and the various functions being performed by the striking municipal employees of Pana. 84 Additionally, the concession is made in the appellant brief for the city of Pana that:

[T]he Benedict-Peters rationale requires courts to take a different approach when they consider injunctions against striking public employees. Instead of simply barring all strikes by public employees, the Court must now consider the public service being offered and decide whether there are sufficient constitutional and/or legislative expressions of public policy which override the Anti-Injunction Act. 85

It is obvious from the briefs filed in the Pana case that both parties

82. OGILVIE REPORT, supra note 16, at 22.
and the Illinois Education Association as amicus curiae felt the pivotal question was whether or not any provision could be found in the constitution or legislative enactments to warrant excluding the particular employees involved from coverage by the anti-injunction law. The supreme court chose not to be constrained by the rather narrow issues presented. In an inexplicable excursion into judicial legislation, the court declared the anti-injunction act applicable only to lawful activity. Since strikes by governmental employees were considered unlawful in 1925, Justice Schaefer reasoned that it could not possibly have been meant to apply to work stoppages by public employees. Support for the decision was found in a 1934 Illinois case, Fenske Brothers v. Upholsterers Union and a 1947 United States Supreme Court decision, United States v. United Mine Workers of America. Fenske involved an attack on the constitutionality of the Illinois Anti-Injunction Act. It was interpreted by the court in Pana as holding the statute in question applicable only to lawful conduct. United Mine Workers provided additional support since it had held the Norris-LaGuardia Act, the federal anti-injunction law, inapplicable to unlawful strikes by federal government employees.

The result brings forth a trilogy of unanswered inquiries. First, what compelled the court to, in effect, reverse its prior Peters-Benedict position? In Benedict, the Illinois Supreme Court was urged to apply the same rule of construction to the Illinois Anti-Injunction Act as the Supreme Court of the United States had applied to the Norris-LaGuardia Act. The County of Peoria, as appellee, argued that, like its federal counterpart, the Illinois act must use express language to divest the sovereign of its rights against striking public employees. Additionally, since Redding had denied the right to strike to municipal employees, appellees argued that such employees “could not come within the purview of the anti-injunction act, expressly or impliedly.”

This argument was rejected in Benedict but was revitalized by the Pana court. This inexplicable reversal brings forth a second question. How could the court base its newly-found rationale on the Fenske case? The Pana court construed Fenske as holding that the purpose of the statute was to prohibit only the enjoining of lawful

87. 358 Ill. 239, 193 N.E. 112 (1934), cert. denied, 295 U.S. 734 (1935).
conduct, and they quote extensively from it to support this conclusion. In so doing, the Pana court apparently misapprehended both the statute and the Fenske decision. The legislature did more than prohibit the enjoining of lawful conduct; it defined what that lawful conduct was now to be. This distinction is important if a case is to be built for denying public employees coverage under the act simply because it was unlawful for them to strike in 1925.

Private sector employees at the time of this legislative enactment were similarly restrained. As the Illinois Appellate Court only three years after Fenske reminds us:

It is true that for many years, when essentially different views were entertained by the courts of this and some other jurisdictions than are now entertained concerning the relative rights of capital and labor, it was held to be the law of this State that even peaceful picketing was unlawful. However, since the enactment in 1925 of the Illinois Anti-Labor-Injunction Act and the decision of our Supreme Court in Fenske Bros. v. Upholsterers' International Union, declaring that act constitutional, "peaceful picketing and peaceful persuasion" are no longer unlawful in this State or the proper subject of injunctive relief.

The Fenske court attempted to reconcile its prior holdings with the new guidelines established by the act. The quotation which appears in Pana was a reassurance to the employers involved that the courts would not be precluded, by virtue of this act, from jurisdiction to grant injunctive relief in all cases. The Fenske court dichotomized labor activity into lawful conduct which the act now defined and protected (including peaceful picketing and persuasion), and unlawful conduct which was still within the province of the court’s injunctive powers. The reference to unlawful conduct was very specific. The court stated:

92. City of Pana v. Crowe, 57 Ill. 2d 547, 549, 316 N.E.2d 513, 514 (1974): Section 12 of article 6 of the constitution of this State provides: "The circuit courts shall have original jurisdiction of all causes in law and equity." It is urged that because that statute prohibits the issuance of injunctions against the peaceable acts therein mentioned, the law deprives the circuit court of its jurisdiction fixed by the constitution and therefore contravenes that provision. In Stephens v. Chicago, Burlington and Quincy Railroad Co., 303 Ill. 49, we said: "The constitution confers upon the circuit court jurisdiction of all causes in equity, and the legislature is without power to deprive it of any part of this jurisdiction." It is to be noticed, however, that the statute in controversy does not deprive circuit courts of jurisdiction to restrain any unlawful act, nor of jurisdiction to determine whether or not any act complained of is legal or illegal. So far as the statute is concerned, circuit courts have the same jurisdiction in labor disputes they have always had, for it cannot be said that they ever had the power, by the constitution or otherwise, to prevent or penalize the performance of lawful acts concerning which no cause of action existed.

The law is, that if the primary purpose is a malevolent one to injure the employer or his business the object is unlawful.\textsuperscript{94} In addition to unlawful objectives, the court included unlawful means: "[P]ersuasion, when so annoying as to become coercive, amounts to intimidation and is unlawful."\textsuperscript{95}

No reference was made to any particular class of employees; the court contemplated unlawful activity as now encompassing conduct, either violent and coercive or with intent to injure the employer. The Pana court reached a tenuous conclusion in holding that by judicially categorizing public employee strikes as unlawful, it was within a Fenske-based exclusion from anti-injunction application.

This leads to the third and final inquiry. If legal precedent does not dictate the court's conclusions, what public policy considerations do? To reverse the effect of prior decisions, some compelling rationale should be presented. This is especially true when granting what is, in effect, a mandatory injunction. The Illinois courts have voiced their concern about granting such injunctions and will normally do so only in cases of great necessity.\textsuperscript{96} The Pana decision can only lead to further distortion by the judiciary of long-settled principles.

There are other jurisdictions which refuse to allow such inconsistent results. In the leading case, School District for the City of Holland v. Holland Education Association, the court was faced with a Michigan statute prohibiting strikes by public employees. Nevertheless, the court concluded:

We here hold it is insufficient merely to show that a concert of prohibited action by public employees has taken place and that \textit{ipso facto} such a showing justifies injunctive relief. We so hold because it is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace.\textsuperscript{97}

The same rationale has recently been adopted by the Supreme Courts of Rhode Island\textsuperscript{98} and New Hampshire.\textsuperscript{99} Additionally, the

\textsuperscript{94} Fenske Bros. v. Upholsterers International Union, 358 Ill. 239, 247, 193 N.E. 112, 116 (1934).
\textsuperscript{95} \textit{Id.} at 258, 193 N.E. at 120.
\textsuperscript{96} See Ambassador Foods Corp. v. Montgomery Ward & Co., 43 Ill. App. 2d 100, 105, 192 N.E.2d 572, 575 (1963). The court considered a reinstatement of the status quo and a return to work by the employees as essentially a mandatory injunction. Such injunctions are only granted after a finding of "extreme urgency or great necessity."
\textsuperscript{97} 380 Mich. 314, 326, 157 N.W.2d 206, 210 (1968).
\textsuperscript{98} School Committee of Westerly v. Westerly Teachers Ass'n, — R.I. —, 299 A.2d 441 (1973).
six states granting a limited right to strike use a similar approach. Although several jurisdictions have reached the same conclusion as the Pana court as to the applicability of their own anti-injunction laws, their rationale is similarly unpersuasive: that public employee strikes are illegal and therefore enjoindable.\textsuperscript{100}

**CONCLUSION**

The illegality issue is far from being resolved. It will not be resolved until the legislature acts responsibly and provides an appropriate framework for public sector bargaining. It is impossible to predict the ultimate form of such legislation, but its effectiveness will be solely dependent on its resolution of the strike, no-strike issue. In the interim, the responsibility lies not by choice, but rather by necessity, with the judiciary. Regardless of how piecemeal and fragmented their involvement, the courts must provide some of the answers.

The Redding decision may have been appropriate to 1965,\textsuperscript{101} but its vitality has been severely diminished by the tenor of the present public employee situation. Its rationale has been criticized, much of its foundation from other jurisdictions has been modified, and its effect as a strike deterrent has recently been negligible.\textsuperscript{102} What is needed is not reversion to antiquated proscription, as the court did in Pana. The use of magical phrases such as "sovereignty" and "essentiality" does not provide answers; this is merely a technique to avoid dealing with the merits of the issues. If there are overriding public policy considerations which mandate the chosen course, the Illinois Supreme Court should discuss them with a forthright delineation of the fundamental issues involved and a well-reasoned resolution.

Public policy does demand protection from strikes endangering safety and welfare, and the judiciary, in the face of legislative inaction, must intervene and provide it. As the vehicle for such intervention is the granting of injunctive relief, then it should be provided—

\textsuperscript{100} See, e.g., Communication Workers of America v. Arizona Board of Regents, 17 Ariz. App. 398, 498 P.2d 472 (1972); Board of Educ. of Montgomery County v. Montgomery County Educ. Ass'n, 67 L.R.R.M. 2745 (Md. Cir. Ct. 1968); City of Minot v. General Drivers & Helpers Union No. 74, 142 N.W.2d 612 (N.D. 1966).

\textsuperscript{101} But see Leahy, The Redding Decision and Reality, 55 Ill. Bar J. 834 (1967).

\textsuperscript{102} In 1972-73 there were nationally 143 teacher strikes occurring in twenty states. Illinois was the second highest with 16. GERR No. 541, D-1 (1974). In 1974 there have already been many Illinois teacher strikes; in Charleston, Freeport, Oak Park, Woodstock, Addison Elementary, Addison and Villa Park High Schools, and Moraine Valley College as of October, 1974. Many others were contemplated, but were avoided by last minute settlements (e.g., Evanston and the city of Chicago's teachers).
but only after a showing that irreparable harm is present. Failure to adjust to the changing public sector situation can only lead to further distortion of the court’s use of its injunctive powers.

Finally, the judiciary itself faces the problem of an erosion of confidence. A court’s effectiveness is dependent upon the moral persuasion its decisions generate in the community. When public policy and social needs require change, it is incumbent upon this state's highest court to adjust accordingly. Little can be gained from decisions blatantly ignored by those intended to be affected. Public employees deserve more than restoration of decade-old rhetoric and injunctions upheld on such tenuous authority as was done in Pana. The court should reconsider its Pana position and establish a guideline more consonant with present day exigencies. In so doing both the judiciary and public employees will be better served.

Max G. Brittain, Jr.